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with the mortgaged property. While, moreover, it is unquestionably arguable that in joining in the mortgage the wife does not, as when she mortgages her separate property, intend to acquire the rights of a surety,¹⁶ the courts have not regarded the presence of such actual intention as a prerequisite to the right of subrogation.

It is to be noted, however, that the scope of the applicability of the general rule under consideration will of necessity vary according to the theory adopted in its support. While the theory of exoneration is equally applicable to all classes of mortgages, the doctrine of subrogation is, on principle, limited to loan mortgages, for it is with respect to these alone that the wife is a necessary party to the transaction by which her rights are subordinated to the mortgage lien. Thus, in the recent case, *In re Hays* (1910) 181 Fed. 674, the court being called upon to direct the disposition of the proceeds of a purchase money mortgage according to the Ohio law, correctly held that the theory of suretyship recognized in that State could not be invoked to secure to the wife more than that share of the surplus representing her inchoate dower in the equity of redemption.

THE RECOVERY OF INTEREST AS DAMAGES IN CONTRACT ACTIONS.— Whereas the interest accruing on an obligation before its maturity is recoverable only by virtue of a contract express or implied stipulating therefor, that which is allowed after maturity is awarded purely as damages for the wrongful detention of the debt.¹ In determining the amount of recovery in such cases, the fundamental principle is that the plaintiff should be fully compensated for the loss that he has sustained. The law, however, places upon him the obligation to take reasonable steps to render his injury as small as possible.² Consequently, just as the vendee on breach of a contract of sale is under a duty to purchase the goods in the open market and charge the vendor with the difference between the contract and the market price,³ so on failure to satisfy an obligation to pay money the plaintiff is under a similar duty to borrow a like sum and charge the defendant with the amount necessarily expended for that purpose.⁴ Since it is to be presumed that the injured party would be obliged to pay the legal rate for the money thus obtained, interest computed on this basis affords him just compensation for his loss. Thus it is evident that the award of interest as damages is not in any sense dependent upon the existence of a contract between the parties providing therefor.⁵ In fact it is immaterial whether or not the obligation itself bears interest, for even if it does, the contract rate prevails only to the date of maturity, whereas

¹⁶See *Durnherr v. Rau* (1892) 135 N. Y. 219.

¹Sedgwick, *Damages* § 282; Sutherland, *Damages* § 300; Loudon *v.* Taxing District (1881) 104 U. S. 771; *Brainard v. Jones* (1858) 18 N. Y. 35; *O'Brien v. Young* (1884) 95 N. Y. 428, 435.

²*Miller v. Mariner's Church* (Me. 1838) 7 Greenl. 51. See 10 COLUMBIA LAW REVIEW 754.

³*Rochester Lantern Co. v. S. & P. Press Co.* (1892) 135 N. Y. 209.

⁴See Sutherland, *Damages* § 76; Loudon *v.* Taxing District *supra*; *O'Brien v. Young* *supra*.

⁵Some cases, however, base the award of interest on a contract implied in law. *Reid v. Rensselaer Glass Factory* (N. Y. 1824) 3 Cow. 393; *Perry v. Taylor* (1871) 1 Utah 63.

after default, the question being merely one of damages for the wrongful detention, the legal rate governs.⁶ Some jurisdictions, however, disregarding the distinction between the principles on which interest is given before and after maturity, assess the damages in the case of interest-bearing obligations according to the contract rate.⁷ This result, it seems, can be justified only on the theory that the stipulation for interest is to be regarded as including an agreement for liquidated damages for a breach of the contract.

According to the prevailing view, interest is recoverable as damages for the breach of express as well as implied promises,⁸ and the rule has even been extended to contracts other than for the payment of money. On theory no reason appears why it should not be allowed whenever the damages are liquidated, or can be determined by computation or by reference to market values.⁹ Since in all such cases the law imposes upon the plaintiff the duty of minimizing his injury, he would necessarily have to lose interest on the sum advanced for this purpose, and consequently interest should constitute a requisite item in the total amount of his damages.

Since interest is allowed only from default, the courts hold that where no fixed date is set for payment, it should be computed from the time that a demand is refused.¹⁰ While the breach generally takes the form of non-compliance with such a demand, any action on the debtor's part amounting to a declaration that the obligation will not be discharged is deemed equivalent to a refusal, and therefore constitutes a breach of the agreement. This has been the result where by absenting himself from the jurisdiction he renders a demand impossible,¹¹ or where by a suspension of payment he makes a general declaration that he will not meet his obligations.¹² In such cases the law will not impose upon the creditor the necessity of making a futile demand. A more difficult question arises where, as in the case of a banking institution, the defendant's doors are closed as a result of proceedings instituted by government officials. Although it is generally held in such a case that if the debtor is actually insolvent a demand is unnecessary and interest should be allowed from the date of suspension,¹³ there is a difference of opinion as to what should be the result if he is subsequently found to be able to discharge all his obligations.¹⁴ Inas-

⁶Ferris *v.* Hard (1892) 135 N. Y. 354; Ludwick *v.* Huntzinger (Pa. 1842) 5 W. & S. 51; Holden *v.* Trust Co. (1879) 100 U. S. 72.

⁷Keene *v.* Keene (1857) 3 C. B. [N. S.] 144; Beckwith *v.* H. P., & F. R. R. (1860) 29 Conn. 268; Union Institution for Savings *v.* Boston (1880) 129 Mass. 82.

⁸Reid *v.* Rensselaer Glass Factory (N. Y. 1824) 3 Cow. 393; s. c. (N. Y. 1825) 5 Cow. 587; Padley *v.* Catterlin (1896) 64 Mo. App. 629; Graham *v.* Chrystal (N. Y. 1865) 2 Keyes 21.

⁹Van Rensselaer *v.* Jewett (1849) 2 N. Y. 135; Laycock *v.* Parker (1899) 103 Wis. 161.

¹⁰Lowndes *v.* Collens (1810) 17 Ves. 27.

¹¹Graham *v.* Chrystal *supra*.

¹²Richmond *v.* Irons (1887) 121 U. S. 27; *Ex parte* Stockman (1904) 70 S. C. 31; cf. *In re Herefordshire Banking Co.* (1867) L. R. 4 Eq. 250.

¹³People *v.* Merchants' Trust Co. (1907) 187 N. Y. 293; Parker *v.* Adams (N. Y. 1902) 38 Misc. 325.

¹⁴See Sickles *v.* Herold (1896) 149 N. Y. 332; Patten *v.* American National Bank (1900) 15 Colo. App. 479; Chemical Nat. Bank *v.* Bailey (1875) 12 Blatch. 480.

much, however, as the breach of contract consists in the refusal to pay, the only question to be determined is whether the act of the bank is tantamount to such a refusal, and it would appear unnecessary to inquire whether or not the suspension of payment was voluntary. Moreover, it is not clear why the ultimate determination of the debtor's solvency or insolvency should be decisive as to his liability for interest.¹⁵ It follows, then, that the suspension of payment should be considered in every instance as a refusal to pay debts, and interest should therefore be allowed from that time. The opposite view was recently upheld in a New York case, *Forschirm v. Mechanics' & Traders' Bank* (1910) 122 N. Y. Supp. 168, on the ground that there was no act on the part of the bank excusing a demand.¹⁶ It would seem, however, that the suspension of business was in fact equivalent to a refusal on the part of the defendant to meet its obligations, and consequently the court might properly have allowed interest from that date.

EFFECT OF PART PAYMENT BY A JOINT DEBTOR UNDER THE STATUTE OF LIMITATIONS.—Although it was decided in England as early as 1781,¹ that a part payment by one joint debtor would mark a new point from which the Statute of Limitations would commence to run on the claim against all,² there is no unanimity of decision on that point in the United States, and three well defined and wholly irreconcilable doctrines have received judicial approval. Some courts have followed the broad doctrine that such a part payment, whenever made, would toll the statute as to all the joint obligors;³ some treat the payment as an acknowledgment of the debt only by the person making the payment;⁴ and others apply the first rule if the payment be made before the statute becomes a bar.⁵

While the results reached in some jurisdictions might be explained by the wording of the particular statute there enacted,⁶ the acts of our State legislatures have in general followed⁷ the English Statute of Limitations which provided that actions should be brought "within six years next after the cause of action, and not after."⁸ Since the statute was enacted partly from the desire to relieve the court from the burden of trying great numbers of ancient causes of action⁹ and partly

¹⁵See *Chemical Nat. Bank v. Bailey* *supra*.

¹⁶See *Sickles v. Herold* *supra*; *Patten v. American Nat. Bank* *supra*.

¹*Whitcomb v. Whiting* (1781) 2 Doug. 652.

²The broad rule stated in *Whitcomb v. Whiting* *supra* that an acknowledgment by one is an acknowledgment for all, has been modified by Lord Tenterdon's Act, 9 George IV, c. 14 so that the rule now obtains only where there is a part payment.

³*Mix v. Shattuck* (1878) 50 Vt. 421.

⁴*Exeter Bank v. Sullivan* (1833) 6 N. H. 124; *Woonsocket Inst. for Savings v. Ballou* (1888) 16 R. I. 351; see *Bell v. Morrison* (1828) 1 Pet. 351; *Van Keuren v. Parmelee* (1849) 2 N. Y. 523.

⁵*Parker v. Butterworth* (1884) 46 N. J. L. 224; see *Hooper v. Hooper* (1895) 81 Md. 155; *Schindel v. Gates* (1877) 46 Md. 604.

⁶See *Whitaker v. Rice* (1864) 9 Minn. 13.

⁷See *Walden v. Heirs of Gratz* (1816) 1 Wheat. 292.

⁸21 Jac. I, c. 16.

⁹See Wood, *Limitations* 4.